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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 56

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

—against—

ANNA HALECKI, Administratrix ad Prosequendum of the Estate of Walter Joseph Halecki, deceased, and ANNA HALECKI, Administratrix of the Estate of Walter Joseph Halecki, deceased,

Libellant-Respondent.

BRIEF OF LIBELLANT-RESPONDENT IN OPPOSITION FOR PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 955

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

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—against—

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BRIEF OF LIBELLANT-RESPONDENT IN OPPOSITION FOR PETITION FOR WRIT OF CERTIORARI

Counter-Statement of Questions Presented

Whether a state may, in enacting a remedial statute permitting recovery for wrongful death, incorporate by reference the standard of liability under maritime law which existed for the benefit of the deceased if he had lived, where such deceased was injured and died on the navigable waters of the United States and within the geographic jurisdiction of a state?

Whether a shipowner is under a duty to provide a seaworthy vessel to an electrician who comes on board a vessel

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to clean some electrical equipment during its annual overhaul, which consisted of painting, making minor repairs, changing lines, working on the engine room, etc., part of which overhaul is done by the ship's crew at the same time while the ship is afloat in navigable waters?

Statement of Facts

This petition involves an affirmance of an appeal from a judgment rendered in favor of plaintiff following a jury verdict for $65,000.00. The plaintiff sued on behalf of the next of kin of a deceased employee of an independent contractor who died as a result of carbon tetrachloride inhalation on defendant's vessel. Plaintiff bases her action on negligence and unseaworthiness.

On or about September 24, 1951 the defendant contracted with Rodermond Industries, Inc. of Jersey City, New Jersey to have certain work done on the Pilot Boat "New Jersey" (P89a) [all references in the Statement of Facts, are to the appendix in the Court of Appeals].

The list of items for work to be done was admitted in evidence as Exhibit 5 and also Exhibit 6 (P6a; P11a). It provided in part (P89a):

> "Crew to remove and replace the 8 cylinder heads for the port and stbd generators.
>
> Contractor to remove the eight (8) heads to the ship, disassemble same, grind in the valves, thoroughly clean out the head, reassemble and return to vessel. Stone commutators to remove high spots and ridges and cut clean to mica all segment bars. Clean and adjust brush riggings and brushes.
>
> *Spray clean with carbon tetrachloride* the armature and field windings to remove all traces of dirt and film. Close up and prove in good order." (Italics ours.)

Mr. Doidge the foreman for the employer of the deceased, testified that with reference to the above quoted item he had consulted with the chief engineer on the boat (P7a). They agreed that the carbon tetrachloride work which had been specified in the contract would be done on Saturday, September 29, 1951 (P8a). He also testified (P8a):

"Q. Did you discuss the danger of the use of this carbon tetrachloride with the chief engineer at that time? A. I don't think so. We just take those things for granted. We knew what it was all about.

The Court: That is the reason you discussed fixing a particular time when to do the work?

The Witness: That is right, your Honor."

The captain of the defendant's vessel was in court but he was not called upon to testify (P79a). The plaintiff had read parts of the testimony on deposition that Captain Haley had given during the presentation of the plaintiff's case (P61a). He had testified that he was the captain of the New Jersey on September 29, 1951 (P61a). On that date the vessel was located at Rodermond Industries in Jersey City for "the annual overhaul" (P62a). Captain Haley testified among other things (P63a):

"Q. When you brought it there, was it brought by you and the officers and your complete crew? A. That is correct, sir, and the Marine Superintendent was aboard, too.

Q. When you say the marine superintendent, the marine superintendent of what company? A. Of our organization."

. . . . . .

"Q. What took place when you first brought the vessel into Rodermond Industries pier in Jersey City?

A. Well, as far as I can recollect, we went up to see the yard superintendent and also the different—what do they call them, various superintendents and snappers or bosses like they say in the shipyard. We discussed what we were going to do with the vessel."

* * * * *

"Q. Just tell me what you did in reference to the vessel. A. We were moored in Rodermond Industries, and I was on board every day during the working hours."

* * * * *

"Q. And what were the work hours? A. From 7.30 until anywhere up to 5, 6 or 7 o'clock at night.

Q. And that was every day while it was at the Rodermond Industries pier? A. With the exception of week-ends, naturally.

Q. During the period of time that you were aboard the vessel while it was at Rodermond Industries pier, during the working hours that you have described, what were your duties aboard the vessel or what did you do aboard the vessel? A. Usually when you go into a yard like this you have a certain amount of deck work to do, like painting, and fixing up minor repairs, a general overhaul of the deck department, renew lines and take care of the general appearance of the vessel, the bridge, the galley, the mess-hall, your rooms, you paint them, and so forth.

Q. Who would do that? A. That would be the deck department.

Q. You mean the deck department of the vessel? A. Of the vessel.

Q. That has nothing to do with Rodermond Industries? A. No, sir."

* * * * *

"Q. During that period of time when it was in the Rodermond Industries yard, during that period around September 29, 1951, could you tell us what the skeleton officers and crew consisted of that remained aboard the vessel to the best of your recollection? A. To my best recollection I had myself, who, as I recall, was the only officer in the deck department, and then I had approximately four or five deck men.

Q. And the engine department? A. We do not have anything to do as far as the engine goes. Do you want me to elaborate?

Q. I will also ask you to go into the engine department, officers and crew of the engine department. A. We had the full complement of engineers and engine room crew aboard.

Q. During that period of time? A. That is correct.

Q. What were the engineers and the engine room crew doing in general aboard the vessel while it was in Rodermond Industries during that period of time? A. They were maintaining the engines and any other specific work that we had to take care of.

Q. Were they also present during the night hours, the engine department? A. In some cases you would have men sleeping aboard the vessel at night.

Q. During that period of time while the vessel was at Rodermond Industries shipyard did the engine department have an officer and crew during the night hours? A. As a standby or as a watch? What do you mean by that?

Q. Anyway at all. A. Well, at night, yes, I will say that there was somebody that represented the engine department aboard the vessel on most of the occasions."

He testified (P67a):

"Q. What was your job or what were your duties during that period of time when the Rodermond Industries were doing some repair work, what did you have to do with reference to the vessel while that repairs work was going on? A. Well, the repair work was represented by the marine superintendent who during the working hours inspected and went around the vessel to see that the different jobs were being done, and discussing the jobs with the snappers, and taking a general interest in that particular work that was being done by Rodermond Industries."

He testified (P69a):

"Q. Then during this entire time while Rodermond Industries were doing their work, their repair work, you have your own deck crew on the vessel doing certain maintenance work and painting work and so forth on board the vessel? A. That is true, yes, sir.

Q. Did your deck crew do that work only the five working days of the week, or did they do such work on Saturdays and Sundays, if you recall? A. If it was necessary they would work on a Saturday or a Sunday.

Q. Did your deck crew work on September 29, 1951, which was a Saturday? A. I had one man there.

Q. Who did you have there? A. Walter Thompson.

Q. What was his position? A. He was to maintain a watch."

He testified (P70a):

"Q. And the inspection of the vessel while it was at Rodermond Industries would also be under your jurisdiction? A. Mine and the marine superintendent.

Q. And if either you or the marine superintendent discovered any unsafe conditions aboard the vessel it would be up to you or him to see that they were corrected? A. Well, naturally."

On cross-examination by his own attorney, he stated (P72a):

"Q. Captain, can you tell me the purpose for which the ship was put into Rodermond Industries? A. For the annual overhaul.

Q. Just briefly what did that consist of? A. That consisted of deck and engine work.

Q. Repairs and overhaul? A. Repair and overhauls, yes.

Q. Was that work done under your orders? A. No, sir.

Q. To your knowledge was it done under any orders of any of the members of the Pilot Association? A. Under the orders of the marine superintendent.

Q. When you say under the orders of the marine superintendent, you mean in accordance with the specifications? A. That is correct."

Not only did the defendant fail to call the Captain of the vessel as a witness, but it failed to call the Chief Engineer of the vessel either although he was still employed by them (P80a). Nor did the defendant call its Marine Superintendent to testify although he was still employed by them (P81a). In fact it didn't call any witness except Walter C. Thompson, the man who was on watch and its medical and engineering experts who did not have direct knowledge of the situation.

The deceased was 40 years old at the time of his death (P1a). He had a wife and three infant children (P1a). He was an electrician employed by the K & S Electrical

Company (P2a). In September of 1951 he worked under Donald Doidge who was a foreman (P5a). The deceased and Doidge brought a blower belonging to Rodermond Industries on board the vessel on Friday for use on Saturday (P15a). It was placed in position about 7 or 8 feet above the engine room floor and tied to a rail (P16a). The Chief Engineer of the vessel had been present on Friday when Doidge made preparations and put the blower in position (P10a; P16a).

On Friday Doidge had sprained his wrist (P29a). Consequently on Saturday he found that he couldn't hold a spray gun and press the trigger on it because of the condition of his wrist. The deceased took over the spraying and Doidge just helped him "move the stuff around" (P29a). Doidge did spray for two or three minutes before he gave up (P29a). Doidge went down into the engine room while the deceased sprayed but later on he didn't go down every time with the deceased (P37a). The deceased would spray for 15 or 20 minutes and would come out of the engine room. Then he'd repeat the procedure (P30a). Mr. Doidge testified (P30a):

> "Q. During the time that he was spraying in the engine room, you stayed on top of the deck? A. At first I stayed down—the first two or three times down there I stayed down with him altogether. Then, as the can got higher he could move it a little himself and then I wouldn't go down quite as much. I would just look in from the top of the engine room."

Mr. Doidge and the deceased started to work about 8:30 a.m. on Saturday morning (P28a). They started spraying about 8:45 or 9:00 a.m. (P28a). They stopped for lunch at noon for about half an hour and then they resumed work until about 3:00 or 3:30 p.m. (P30a). They

both left the vessel. The deceased complained of a "peculiar taste in his mouth" (P31a). The defendant's crew member who had been on watch testified that "at the end of the day one of the fellows just said he wasn't feeling well" (P78a). Mr. Doidge testified that the deceased had been a sober man on the job (P31a).

Both Doidge and the deceased used three gas masks supplied by K & S Electric Co. (P27a). They were regular Army surplus gas masks (P27a). Doidge checked the gas masks before they used them (P36a). He stated that whenever he saw the deceased working below he wore a mask (P38a). Mr. Doidge also testified on cross-examination that the gas masks were not defective because the Police Department had checked the masks after the accident and he received a report from them (P42a; P43a).

The cause of death of the deceased was admitted. During the cross-examination of defendant's medical expert, the trial court asked (P84a):

> "The Court: The autopsy diagnosis was death from carbon tetrachloride poisoning. You are in agreement with that?
>
> The Witness: Yes, sir.
>
> The Court: I think everybody is in agreement on that. Is there any question about that?
>
> Mr. Mahoney: The defendant does not take issue with that, your Honor."

The great danger involved in the use of carbon tetrachloride in a confined place without proper ventilation was not disputed (P8a; P34a; P41a; P45a; P50a; P82a; P86a).

Dr. Robert P. Gaines was called upon to testify for plaintiff. He had a Ph.D. in chemistry and was a biochemist with specialty in toxicology and public safety

(P46a). He testified that carbon tetrachloride is a member of the methane series in organic chemistry; that it had a specific gravity of 1.54 which means it is heavier than water; that it had a boiling point of 77 degrees Centigrade which meant that it was "rather volatile" (P46a). Carbon tetrachloride is about 5 times heavier than air (P53a).

He stated that at one time it was used as a medicine to eliminate worms but this was discontinued when it was discovered that this was a "toxic substance." It then became popular in connection with fire extinguishers because it was a non-conductor of electricity and could be used where electrical devices were involved. However it was found that these fire-extinguishers when used in confined places caused poisonings and warning labels were subsequently affixed to them (P47a). It was discovered that carbon tetrachloride was an ideal, economical, and efficient solvent where grease was involved and it came into more general use. Then it was discovered that employees in industries where the chemical was in wide use began to develop complaints. Studies were then made by public health authorities about 20 years ago and it was found that the chemical could be used if "adequate ventilation was provided" (P48a). A concentration of 50 to 100 parts per million of carbon tetrachloride was considered safe (P49a). Dr. Gaines also developed in his testimony the toxicological process by which the chemical affected the human body (P49a). He testified that exposure or inhalation of carbon tetrachloride in an amount beyond the safe concentration would be "obviously harmful and deleterious" (P50a). The concentration stated by the expert represents weight per unit volume and reflects the concentration of strength (P51a; P52a).

Dr. Gaines testified that in view of the fact that carbon tetrachloride is about five times heavier than air it would

sink to the bottom of the engine room and have the greatest concentration there (P53a). The blowers would merely act to agitate or stir up the air in the engine room rather than replace it or remove it (P53a). Proper ventilation would require ventilating ducts *at floor level* (P56a).

Doidge testified that the engine room was approximately 40 feet long, 30 feet wide and about 18 feet high (D5a). He stated that they had used 8 gallons of carbon tetrachloride (D6a). Dr. Gaines computed on the basis of these dimensions and without considering the displacement by machinery in the room that this involved 21,600 cubic feet of air (D22a). He testified that temperature variations except where the freezing point is reached would make very little difference in volatization (D23a). Taking a temperature of 25 degrees Centigrade as an average temperature, Dr. Gaines concluded that in a space 40 by 30 by 18 feet, eight gallons of carbon tetrachloride sprayed in six hours would produce a concentration of 20,000 parts per million (D23a). There was machinery in this room (P82a; P83a). This, as a matter of physical fact, would increase the concentration and the danger. This would produce at least 200 times the allowable safe concentration (D24a). Dr. Gaines testified (D32a):

> "The Court: The actual concentration in the area, of course, would depend upon the effectiveness of the ventilating units; is that correct?
>
> The Witness: And the amount of material present.
>
> The Court: When you say the amount of material present, I don't follow that.
>
> The Witness: That is, whether they used a pint bottle or a gallon bottle, or five gallons.
>
> The Court: Well, to put it more specifically, I thought my question was clear, you gave a figure of 20,000 parts per million. Is it correct to suggest that

that is the maximum which does not take into account any of the ventilating items contained in that?

The Witness: Yes.

The Court: Because in reaching that figure you excluded all ventilating factors.

The Witness: Yes, I used that in a confined area.

The Court: And accordingly the actual concentration per million in that engine room would depend upon the effectiveness of the ventilating units?

The Witness: Yes, and we believe that we used those measurements without allowing for displacement by equipment."

However he also testified (P59a):

"Q. The Court will ask a question at this time. Of course, your answers were based upon the hypothetical information given to you when Mr. Baker questioned you. He described these various items of ventilation. A. Yes, sir.

Q. And I take it to that extent, at least, your answer was based upon a hyphothetical state of facts? A. Limited within that, yes.

Q. Counsel just asked you whether or not you knew that these various items were functioning properly and you said you didn't know? A. Of course not.

Q. I say to you now that the evidence in the case is that all these items were operating properly and functioning properly on the day in question. That is the testimony of Mr. Doidge. Would that make any difference in your answer as to the extent of concentration on that day in that area? I want to assure both counsel it is their duty to object to the question if it should be objected to.

Mr. Mahoney: No objection. I understand that is the evidence.

A. If his Honor pleases, I recall two doors being on the side at about eight feet above floor level. *That door would be the only factor in the testimony or in the items introduced as being somewhat efficacious in removing the vapors, because that was low down, near to the floor.*

The circulating fan would have no bearing on the removal of the vapors. It would merely act as a circulating agent. The air hose, which was supplied near the operator's face, would have no effect at all on the diminution or the increasing of the concentration. I recall now an exhaust pipe sucking air out of this room, and I believe that would have—and I do say that—without any hesitation I say that that would be instrumental in diminishing the concentration in the room, but as to how much I cannot say.

I recall a hose near the ceiling as coming in with fresh air. That, sir, would be very little because it would be merely blowing in fresh air which would be increasing the concentration at the lower level.

Then the two skylights that are open again would have no effect on ventilation, but it would have on dilution because we must bear in mind, sir, that this vapor is more than five times heavier than air, 5.3 or .4. I said three times heavier before, and I meant five.

Therefore your concentration would be increased near the floor level and gradually increased as it goes up. I would say that all the items that were enumerated by both attorneys would have some effect, especially the doors and your exhaust. The others would have a negligible effect. Do I answer the question, sir?" (Italics ours.)

The defendant's expert engineer on cross-examination confirmed Dr. Gaines's opinion (P86a):

"Q. In your opinion, was that system adequate to remove carbon tetrachloride from the engine room? A. In my opinion it was not.

Q. And why do you say that, Mr. Finkenaur? A. I don't see how you could expect any ship's ventilating system to take care of those noxious gases that are introduced, and particularly those that are heavier than air and lie down near the bilges. You would have to have a special blowing device to stir that air up and permit it to circulate out with the rest of the exhausted air."

The jury returned a verdict for $62,500 for the pecuniary loss to the widow and dependent children and for $2500 for conscious pain and suffering of the decedent (P69a). Defendant moved to set aside the verdict, for judgment notwithstanding the verdict and for a new trial. All motions were denied.

The judgment was affirmed in the Court of Appeals. Judge Learned Hand wrote the majority opinion. Judge Hincks agreed with Judge Hand, while Judge Lumbard dissented.

POINT I

Two Courts of Appeal have interpreted the New Jersey Wrongful Death Act to apply the standards of maritime law in accidents which occurred on the navigable waters within the geographic jurisdiction of the State of New Jersey and there are no conflicting decisions on this interpretation of New Jersey law.

Two Courts of Appeal, in the Second Circuit and the Third Circuit respectively, which handle a large volume of maritime cases, after lengthy and thoughtful argument and consideration have agreed that the New Jersey Wrongful Death Act permits an action based on unseaworthiness and applies maritime principles of tort liability where the deceased, if he had lived, would have had a right to recovery on such principles of liability. *Skovgaard* v. *The M/V Tungus*, 252 F. 2d 14 (3 Cir. 1957); *Halecki* v. *United New York and New Jersey S. H. P. Ass'n*, 251 F. 2d 708 (2 Cir. 1958). This court in *Kernan* v. *American Dredging Co.*, 355 U. S. 424, 78 S. Ct. 394, L. Ed. (1958) in footnote 4 of Mr. Justice Brennan's opinion referred to the opinion of the Court of Appeals in the *Skovgaard* case with apparent approval indicating in said footnote that the reasoning of the court in the *Skovgaard* case was consistent with the decisions of this court in determining the remedy available for death occurring on navigable waters. In addition, the decision of the Court of Appeals in this case written by Judge Learned Hand is consistent with and logically follows the decisions of this court in *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); *Levinson* v. *Deupree*, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953); *Just* v. *Chambers*, 312 U. S. 668, 61 S. Ct. 687, 85 L. Ed. 903 (1941); *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210 (1921); *Old Dominion S.S. Co.* v. *Gilmore*, 207

U. S. 398, 28 S. Ct. 133, 52 S. Ct. 264 (1907). Pursuant to these decisions it is clear that although maritime law does not give the next of kin of a deceased a right to recover under the maritime law itself, the maritime law will adopt and enforce a state wrongful death act to supplement the general maritime law.

The petitioners do not quarrel apparently with the construction of the New Jersey Wrongful Death Act which would permit recovery for negligence. This has been established for several years. *Gill* v. *United States,* 184 F. 2d 49 (2 Cir. 1950); *The H. S. Inc. No. 72,* 130 F. 2d 341 (3 Cir. 1942). On the other hand the plaintiff does not claim that the maritime law, by itself, gives a remedy to the next of kin for wrongful death. The issue in this case is not whether the maritime law permits recovery for wrongful death but whether the New Jersey Wrongful Death Act when adopted and enforced as part of maritime law will use the same test of liability as the deceased would have had if he had lived. The issue, as framed and decided by the majority in the Court of Appeals, involved *a construction of a state wrongful death act* rather than any alteration or departure from existing decisions of this court.

The defendants allege that the decision of the Court of Appeals interpreting the New Jersey Wrongful Death Act is in conflict with the decisions of other federal courts. None of the decisions referred to in the petition involve the New Jersey Wrongful Death Act. It is possible that the Wrongful Death Acts of other states may receive a much more narrow interpretation than the one involved in this case because of state court decisions narrowly construing such acts or because of differences in the wording of the statutes.

In the Pennsylvania statute, 12 Purdon, Penna. Statutes Anno. §1601, the test of liability is merely set forth as "unlawful violence or negligence" rather than "wrongful act, neglect or default" as set forth in the New Jersey statute. Furthermore, the Pennsylvania does not employ the "such as" test of the New Jersey statute which incorporates the test of liability based on the rights of the deceased if he had lived.

Under such circumstances the Court of Appeals for the Third Circuit may consistently reach one result under the New Jersey Act, *Skovgaard* v. *M/V Tungus,* 252 F. 2d 14 (3 Cir. 1957) and a different result under the Pennsylvania statute. *Hill* v. *Waterman,* 251 F. 2d 655 (3 Cir. 1958); *Curtis* v. *Garcia,* 241 F. 2d 30 (3 Cir. 1957).

POINT II

The interpretation by the Court of Appeals of the New Jersey Wrongful Death Act is fully consistent with the plain language of the statute and the New Jersey decisions interpreting the statute.

The construction of the Court of Appeals in holding that the New Jersey Wrongful Death Act incorporated the same test of liability as would be applied if the deceased had lived was consistent with the plain language of the Statute and with the decisions of the New Jersey courts.

N. J. S. A. 2A:31-1 provides in part:

> "When the death of a person is caused by *a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages* resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, * * *" (Italics ours.)

The courts of New Jersey have consistently held that the test of liability under the New Jersey Wrongful Death Act is the test of liability which would apply if the deceased had lived. In *Consolidated Traction Co.* v. *Home*, 59 N. J. L. 275, 35 A. 899 (Supr. Ct. 1896), Chief Justice Beasley had stated in interpreting the New Jersey Wrongful Death Act at page 900 of Atlantic:

> "* * * From these extracts from the statute it will be at once perceived that in this suit, founded upon it, as in all others of the same class, but two questions are raised, and but two can be raised upon the record, viz: *First, could the deceased, if he had survived, have maintained an action?* And, second, this being so, what pecuniary loss has fallen on his next of kin by reason of his death? * * *". (Italics ours.)

The above is quoted with approval in *Bastedo* v. *Frailey*, 109 N. J. L. 390, 162 A. 621 (E. & A. 1932). In view of the above, the Court of Appeals properly held that the test of liability, *i.e.*, the right to maintain an action was determined by the rights the deceased would have had if he had lived. See also *Coulter* v. *New Jersey Pulverizing Co.*, 11 N. J. Misc. 5, 163 A. 661 (Supr. 1932), where it was held that suit could not be brought for wrongful death where the Statute of Limitations had run before the death of the deceased, because "the statute only gives an action if the deceased had one." Not only is the nature and extent of the liability under the New Jersey Wrongful Death Act made co-extensive with the liability the deceased could have alleged if he lived, but the broad wording of the statute permits recovery for unseaworthiness as well as negligence.

Judge Staley, writing for the majority in the *Skovgaard* case stated:

"We hold that failure to provide a seaworthy vessel in the case before us is such 'wrongful act, neglect or default' as will allow recovery under the New Jersey Wrongful Death statute."

Judge Learned Hand in the *Halecki* case held with reference to the New Jersey Statute and the warranty of seaworthiness (Pet. 28a):

"* * * We hold that 'neglect' and 'default' both cover a breach of the warranty."

The conclusions of Judge Staley and Judge Learned hand are amply supported. In *Judson* v. *Peoples Bank & Trust Company of Westfield*, 17 N. J. 67, 110 A. 2d 24 (1954), in constructing the meaning of the "wrongful act, neglect or default" of joint tortfeasors Mr. Justice Brennan held that the phrase included all torts of commission and omission. See also *Burns* v. *Bethlehem Steel Co.*, 20 N. J. 37, 118 A. 2d 544 (1955), where the words "wrongful act, neglect, or default" in a limitations statute were held to include a cause of action for personal injuries whether the action was based on tort or contract concepts.

In *Orez* v. *American President Lines, Ltd.*, 154 Fed. Supp. 241 (S. D. N. Y. 1957), the phrase "wrongful act, neglect, or default" as used in the New Jersey statute of limitations was held to include a claim based on unseaworthiness. The same phrase in the New York Wrongful Death statute has been held to include an action based on a warranty of fitness for use. *Greco* v. *Kresge*, 277 N. Y. 26, 12 N. E. 2d 557 (1938). The construction given to the New Jersey Wrongful Death Act by the Court of Appeals was reasonable and in full accord with the decisions of the courts of New Jersey interpreting the act. No New Jersey case directly or indirectly stands for the proposition which petitioner urges this court to adopt.

The construction given by the Court of Appeals is further buttressed by the fact that the New Jersey courts regard the New Jersey Wrongful Death Act "entirely and in the highest sense remedial in its nature." *Haggerty* v. *Central Railroad Co.*, 31 N. J. L. 349 (Supr. Ct. 1865). In construing it, "the rule is to avoid all subtle inventions and evasions for the continuance of the remedy" and "the duty of the court is to add force and life to the cure and remedy." *Murphy* v. *Board of Chosen Freeholders of Mercer County*, 57 N. J. L. 245, 31 A. 229 (Supr. Ct. 1894). See also *Hartman* v. *City of Brigantine*, 42 N. J. Super. 247, 126 A. 2d 224 (App. Div. 1956), aff'd 23 N. J. 530, 129 A. 2d 876 (1957). Aside from the rule of construction that a remedial statute is to be liberally construed the court also must adopt a reasonable and fair construction in preference to a harsh or arbitrary one. If the construction of the Court of Appeals is rejected then an absurd situation would arise. Where a deceased died on a vessel in navigable waters of the United States and within the geographic area of a state his survival cause of action would be determined under maritime law, *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 36, 74 S. Ct. 202, 98 L. Ed. 143 (1953), while the wrongful death action would be determined by analogous state law applied to situations on land. *Cf.* Comment of Judge Woodbury in *O'Leary* v. *United States Line Company*, 215 F. 2d 708 (1 Cir. 1954), cer. den. 348 U. S. 939, 75 S. Ct. 360, 99 L. Ed. 735 (1955). In the absence of any direct statement in the statute or any construction by the New Jersey courts that such an absurd situation was a desired purpose of the New Jersey Wrongful Death Act, the Court of Appeals properly gave the statute a fair and reasonable construction.

Obviously the purpose of the act is to incorporate the test of liability which would have existed if the deceased had lived. In this respect the next of kin are given neither

greater or smaller rights than the deceased. In a case where the deceased died as a result of injuries received while a business invitee in a retail store, the law relating to the rights and duties of business invitees and storekeepers would apply. By the same logic, where the deceased died as a result of injuries received on navigable waters within the boundaries of a state the law relating to the rights and duties of shipowners and those who come on board would apply. Since *Pope & Talbot, Inc.* v. *Hawn*, cited *supra*, the law applied would be the maritime law of the United States. It would be unreasonable to conclude that the legislature of New Jersey intended it otherwise particularly in view of the referral nature of the statutory language.

The New Jersey Wrongful Death Act does not have any language in it setting forth either contributory negligence or assumption of risk as defenses to an action brought under it. Judge Learned Hand in the *Halecki* case held specifically (Pet. 30a):

> "* * * and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar."

Judge Learned Hand's determination in the *Halecki* case is consonant with a reasonable interpretation of the New Jersey Wrongful Death Act. The test of liability is coextensive regardless of whether the deceased had lived and recovered for his personal injury or dies and his next of kin sue. It would require a finding of unreasonable logic on the part of the New Jersey legislature in passing a remedial statute to hold that a widow's claim could be barred by contributory negligence, however, slight it may be, but that the deceased, if he had lived could have re-

covered. The legislature did not intend such a result. It did not specifically set forth such defenses. Instead it used a "referral test" for the very purpose of avoiding such an anomoly. See *The Devona*, 1 Fed. 2d 482 (D. C. Me. 1924).

POINT III

The deceased was entitled to a seaworthy vessel at the time of his death.

Judge Learned Hand in discussing the question of the duty of the defendants to supply the deceased with a seaworthy vessel stated (Pet. 26a):

> "* * *. *We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff* in Pope & Talbot v. Hawn, supra. (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. *Since the deceased was cleaning the ship,* we hold that it was within the doctrine of Pope & Talbot v. Hawn, supra.
>
> As might be expected, so shadowy a line of demarcation will in application produce inconsistent results. For example, in Read v. United States, 201 F. 2d 758, the Third Circuit held that the warranty extended to a 'business guest' who was doing part of the work of changing a 'Liberty' ship into a transport, while the Ninth Circuit in Berryhill v. Pacific Far East Line, 238 F. 2d 385, cert. den. 354 U. S. 938, refused relief to a workman who was engaged in 'major repairs,' as these were described in the District Court (138 Fed. Supp.

859). In the appeal in Berge v. National Bulk Carriers, Inc. (148 Fed. Supp. 608), decided herewith, we shall state the reasons that impel us to prefer the decision of the Ninth Circuit, but it is not necessary to pass on that question here, because as we have said, *the work did not involve any structual changes in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul.* We start therefore with the conclusion that it was proper to leave to the jury, not only the issue of negligence, but that of unseaworthiness." (Italics ours.)

The defendant's vessel in the present case, was getting its "annual overhaul" at the time of the accident. The defendant's witness, Walter C. Thompson, characterized the "annual overhaul or the annual repairs" (p. 76a):

> "A. Well it consists of painting the boat, *making minor repairs*, changing the lines, working on the engine room, and so forth." (Italics ours.)

The vessel had remained in the water at Rodermond Industries for about three weeks (pp. 15a; 75a). The captain of the vessel was on board the vessel every day (p. 64a). In addition there were four or five deckmen on board and the full complement of engineers and engine room crew on board (p. 65a). Some men slept on board the vessel (p. 65a). According to the specifications the *ship's crew* were to "remove and place the 8 cylinder heads" on the very generators the deceased cleaned (p. 89a). The ship's crew worked during the "annual overhaul" alongside of the contractors and the work was done under the orders and supervision of defendant's Captain, Chief Engineer and Marine Superintendent (pp. 9a; 10a; 67a; 68a; 70a; 72a).

The use of electrical equipment on board a vessel is of comparatively recent origin. However, the electrician on board a modern vessel serves as important a function in the ability of the vessel to navigate as any other member of a vessel's crew. The agreement between the National Maritime Union of America and various companies and agents in Atlantic and Gulf Coast Ports of June 16, 1956 lists the following specific unlicensed personnel classifications under the agreement: "Electricians," "Watch Electricians," "Day Electricians," "Second Electrician," "Deck Electrician," "Maintenance Electricians." This illustrates the fallacy in the contention of the defendant that the work of the decedent was not work "traditionally performed by seamen." Modern vessels are large and complex mechanisms. Even those vessels that are not electric motor ships use large quantities of electrical equipment for lighting and other functions on a vessel. Obviously, whatever their designation, each such vessel must have one or more members of the crew who are trained to inspect, clean, and maintain electrical equipment on board. Sometimes a particular vessel may not have a crew member sufficiently skilled to perform certain types of electrical work, which could otherwise be performed by a competent member of the crew if one were on board. This does not operate to make the work any less work "traditionally performed by seamen." The fact that the owner may seek to have certain types of maintenance work done by a contractor employee and "seeks to have it done with the advantages of more modern divisions of labor" to use Mr. Judge Rutledge's words, "does not minimize the hazard and should not nullify his protection." *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

The peculiarities of maritime conditions apply to electricians as well as to other members of the crew. It is the requirement of working in confined places and in the peculiar conditions caused by the limitations of space, machinery,

and structure, inherent in the design of a vessel that creates special risks.

POINT IV

There was no disagreement in the Court of Appeals concerning the fact that the evidence would support a verdict based on negligence.

There was no disagreement in the Court of Appeals concerning the fact that there was sufficient evidence which would warrant a recovery on the ground of negligence. Judge Lombard based his dissent on the issues of unseaworthiness and comparative negligence. He did not state that he would have dismissed the complaint entirely but rather that he would have remanded the case for a new trial on the issue of negligence only. He could come to this conclusion only if he felt that there was evidence from which a jury could conclude that the defendants were negligent (Pet. 39a). Therefore the trial judge and the three judges of the Court of Appeals who reviewed the record in this case all agreed that there was sufficient evidence from which a jury could find that the defendant had been negligent.

The defendants had an affirmative non-delegable duty to provide a reasonably safe place to work. See *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.* U. S. , 78 S. Ct. 438, L. Ed. (1958); *Gunnarson* v. *Robert Jacobs, Inc.*, 94 F. 2d 170 (2 Cir. 1938) cert. den. 303 U. S. 660, 58 S. Ct. 764, 82 L. Ed. 1119 (1938); *Guerrini* v. *United States*, 167 F. 2d 352 (2 Cir. 1948); *Anderson* v. *Lorentzen*, 160 F. 2d 173 (2 Cir. 1947); *Puleo* v. *H. E. Moss*, 159 F. 2d 842 (2 Cir. 1947).

The factual findings in this death case were amply supported by the evidence and were within the province of

the jury. *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 76 S. Ct. 608, 100 L. Ed. 668 (1956); *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946).

CONCLUSION

The petition should be denied because

(a) The issues were fully and completely presented and argued in the court below and were correctly decided.

(b) The issue basically involves the interpretation of the New Jersey Wrongful Death Act and the interpretation of the court below is supported by the language of the statute and the decisions of the New Jersey courts to the extent they are applicable.

(c) The decision of the court below logically follows and is fully consistent with the decisions of this court and the decisions of other courts dealing with the interpretation of other state acts are not in conflict therewith.

Dated: Hoboken, N. J.
May , 1958.

Respectfully submitted.

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